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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. . . . . .

EDNA CLARK,
a minor, by Charles K. Clark,
Father and Next Friend,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY
(a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment entered by said Court on April 10, 1952 (R. 99).

MATTER INVOLVED.

The judgment was entered upon an appeal taken by petitioner from the judgment of the District Court of the United States for the Northern District of Ohio, Eastern Division, under date of April 9, 1951 (R. 92), in an action brought by petitioner against The Baltimore and Ohio Railroad Company, wherein the District Court granted Respondent's motion for a directed verdict contrary to the

fact that Respondent admitted a violation of an Ohio state statute by their own evidence, wherein the Ohio state statute makes mandatory the blowing of a whistle and continuous ringing of a bell not less than 1320 feet from a crossing. Respondent's evidence is very clear as to the violation of the Ohio statute, but contrary to this factual situation the District Court and Court of Appeals have refused to permit petitioner's case to go to a jury and in their opinions have ignored and left out the very positive and convincing evidence of Respondent's witnesses in regard to violation of the aforesaid statute. The Court of Appeals denied the Petitioner's petition for rehearing and in a very short opinion completely misconstrued the very positive and convincing evidence of the violation of the state statute by Respondent.

JURISDICTION.

The jurisdiction of this Court is invoked under Rule 38(b) which reads as follows: Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been but should be settled by this Court; or has decided a federal question in a way probably in conflict with applicable decisions of this Court; *or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.*

Roth vs. Pennsylvania Co., 195 Fed. 21;
Hales vs. Railroad Co., 200 Fed. 533;
Railways vs. Walks, 279 Fed. 32.

QUESTION PRESENTED.

Respondent's admission of violation of a mandatory state statute which makes the petitioner's case one for the jury under Ohio law.

SPECIFICATION OF ERRORS TO BE USED.

The Sixth Circuit erred:

(1) Sixth Circuit by its decision in this case is attempting to nullify a mandatory provision in the Ohio state statute in affirming Respondent's motion to take this case from the jury, all of which is in direct conflict with the laws of the State of Ohio, where the Respondent's evidence admits the violation of a state statute, by clear and convincing evidence.

(2) In denying the petition for rehearing.

REASON RELIED ON FOR ALLOWANCE OF WRIT.

The Court will note that neither the District Court nor the Court of Appeals in their opinions mention the violation of the state statute which makes it mandatory to blow the whistle within not less than 1320 feet, when by clear and convincing evidence the Respondent's evidence discloses a violation of the state statute and therefore immediately makes it a case for the jury, which right both courts have denied the Petitioner.

CONCLUSION.

For the foregoing reasons it is submitted that this petition for writ of certiorari should be granted.

Respectfully,

MARSTON G. BERGMANN,
ROBERT H. DAWSON,
Attorneys for Petitioner.

June 26, 1952.

BRIEF AND REASON FOR GRANTING WRIT.

The fact that not one word in the Court's Opinion on the original appeal mentions the clear and convincing evidence from the defendant's witnesses that the defendant was guilty of a violation of the State Statute governing the blowing of the whistle for a crossing under Ohio General Code, Section 8853, the important part of which reads "**shall** *sound such whistle at a distance of at least eighty* and not further than one hundred rods from such crossing, and ring such bell continuously until the engine passes the crossing." This violation is more than sufficient to reverse the ruling of the trial Court.

ARGUMENT WITH FACTS OF POSITIVE EVIDENCE OF VIOLATION OF THE OHIO STATE STATUTE AS SET FORTH BY DEFENDANT'S EVIDENCE.

It seems unbelievable that neither the trial Court nor this Court of Appeals mentions the violation of Ohio General Code Section 8853 in regards to the positive testimony and admission by defendant's witnesses that the whistle of the train was not blown until about 750 feet or less from the crossing on Bagley Road, all of which is in violation of law and negligence *per se*. The evidence being overwhelming as to this violation.

Surely this failure to even comment on this evidence by either Court is shocking to the Appellant.

If this Court will carefully review the defendant's testimony regarding the blowing of the whistle for the crossing upon which the accident happened, we are sure they will agree with us that there is clear and convincing evidence that the defendant was guilty of a violation of this statute from the mouths of all of defendant's own witnesses.

This Court in its opinion in the original appeal dwells entirely on the testimony of the plaintiff's witnesses, we say to you that if you throw out and ignore every word of the plaintiff's testimony in the case at bar there is more than sufficient evidence from the mouths of the defendant's witnesses to reverse the finding of the trial Court.

No Court has the right to say that the violation of a State Statute which is negligence *per se* is or is not a proximate cause. That is a question for the jury.

This Court in rendering its decision in the original appeal in this case devotes practically all of its attention to the testimony of plaintiff's witnesses and goes on to say, "it is obvious that appellant has much to overcome in order to sustain the contention that the claimed failure of the railroad company to give warning signals contributed to the collision." Such a statement is astounding in view of the fact that the defense witnesses showed clear and convincing evidence of a violation of the statute regarding the sounding of a whistle at the proper distance from the crossing upon which the accident happened.

Again if all the testimony of the plaintiff's witnesses was thrown out and entirely ignored there is ample evidence from the defendant's witnesses to take this case to the jury. This Court seems to say that a whistle was blown and a bell rung *but neglects to say when and where said whistle was blown.* There is nothing negative about the defense testimony regarding where this whistle was blown for the Bagley Road crossing. Plaintiff-Appellant is citing all the testimony of all six defense witnesses by reference to page and number of questions and answers relating to when and where the whistle was blown. If this is not overwhelming testimony of a violation of the State Statute then we know nothing of evidence.

This Court in referring to the opinion of the trial Court says, "that in the face of substantial uncontradicted testimony that the signals were given the evidence is not sufficient to present to the jury the question as to whether such signals were given." The plaintiff-appellant is not disputing that signals were given but she is disputing that they were given as required by the Statute. It would seem that in the opinion of this Court it makes no difference how far from the crossing the whistle signal was given the defendant complied with the law, whether it was 1320 feet, the minimum distance as required by the statute, or 100 feet from the crossing. This is shocking as this Court will have to agree.

The Plaintiff-Appellant is citing one more case in addition to those cited in her brief. This case is *Swoboda v. Brown,* 129 O. S. 522.

In this case on page 522, Judge Matthias in rendering this opinion said,

> "Where a specific requirement is made by statute and an absolute duty thereby imposed, no inquiry is to be made whether the defendant acted as a reasonable prudent man or was in the exercise of ordinary care. In such a situation the obligation and requirement has been fixed and established by law and the conduct of any person which is violative of such specific statutory requirement is illegal and if it proximately results in an injury to one to whom a legal duty is owed the transgressor is liable for the resulting damage. *In such case the jury is not called upon to determine whether the conduct constituted negligence, it determines only whether the act prohibited was committed or the act required by law was omitted as the case may be.* The violator of such specific requirement of law is liable irrespective of the question as to whether his act is such as is deemed to meet and satisfy the test of ordinary or

reasonable care which would be applied in the absence of statutory definition and imposition of absolute duty, such as for instance the absolute and specific requirement as to headlights. Where the standard of duty is thus fixed and absolute it being the same under all circumstances the failure to observe that requirement is clearly negligence per se." (Italics our own.)

The violation of this statute by clear and convincing evidence was given by two of the defense witnesses, namely; Earl E. Pfoh, the conductor of the train, and Virgil C. Ferguson, the flagman on the train, both of whom testified that the whistle for the Bagley Road crossing which was the scene of the accident was blown when the engine of the train was approximately 700 feet from the Bagley Road crossing, and at no other time.

The Court on ruling on this case either forgot or ignored this testimony. Surely this Court cannot say they do not believe these witnesses. Three other defense witnesses testified to the whistle having been blown for this crossing at a much closer distance than testified to by the defendant's employees.

The two employees fix the distance from the crossing at approximately 700 feet when the whistle was blown. This distance is arrived at by estimating the length of the train which consisted of an engine, nine cars and a caboose. A car being 40 feet in length, an engine at least 60 feet and a caboose 30 feet; the total length being approximately 450 feet for the overall length of the train. The distance from Bagley Road crossing and the Fry Road crossing was testified to as between 1000 and 1200 feet. Take 450 feet from the greater distance and the result is 750 feet or a little more than half the distance required by statute which is 1320 feet. These two witnesses were riding on the caboose of the train and testified that

the whistle was blown when the caboose was on or over the Fry Road crossing. They testified to hearing no other whistles for the Bagley Road crossing.

Any whistle blown for a crossing 1319 feet from that crossing is as much of a violation of the State Statute as though it was blown 100 feet from the crossing or not blown at all. *1320 feet is the absolute minimum distance a whistle must,* not may, be blown.

In view of this testimony of the defense witnesses is it any wonder that we feel so strongly about the Court's finding in this case?

DEFENDANT'S EVIDENCE IN DIRECT EXAMINATION DISCLOSING THE VIOLATION OF THE STATE STATUTE IS TO BE FOUND IN THE FOLLOWING SECTIONS OF THE RECORD OF THE TRANSCRIPT AND INCLUDES ALL SIX OF THEIR WITNESSES.

Direct Examination of Conductor Earl E. Pfoh.

Questions 8-12-13-14-15 and answers Page 46 of Transcript. In these questions and answers Pfoh testified that the distance between Fry Road crossing and Bagley Road crossing was not quite 25 car lengths and that a car length was 40 feet.

Question 16 and answer on Page 46 of Transcript Pfoh testified that the whistle was blown for the Fry Road crossing.

Questions 6-7-8-9-10-11 on Page 47 of Transcript, Pfoh testified that when the caboose was on the Fry Road crossing the whistle was blown for the Bagley Road crossing. The train consisted of an engine, 9 cars and a caboose. The length of this train would be approximately 450 feet. This being the case the engine of the train would be approximately 750 feet from the Bagley Road crossing when

the whistle was blown. The minimum distance the whistle should have been blown according to the Statute is 1320 feet. When you take into consideration the fact that Pfoh testified that the emergency went on at the last blast of the whistle and that the Engineer Carr testified in answer to question 15 on page 58 of Transcript that he applied the brakes when he was 134 feet from the crossing at Bagley Road, granting that it would take 10 seconds for the blowing of the whistle which is generous and that if the train was running at the rate of 25 miles an hour, which was testified to by Earl E. Pfoh, a member of the train crew in question 1 and answer Page 51 of Transcript: the train would be running at the rate of 36 feet per second or 360 feet in ten seconds, add 134 feet to this we would get 494 feet which would be the distance the engine was from the Bagley Road crossing when the whistle was blown for this crossing.

Direct Examination of Flagman Virgil C. Ferguson.

Questions 2-3-4-5-6-7-8-9 and answers on Page 53 of Transcript in which Ferguson testified that when the whistle was blown for the Bagley Road crossing the caboose upon which he was riding was on the Fry Road crossing and that at the last blast of the whistle the emergency went on. His testimony is practically the same as Conductor Pfoh. So nearly the same that it lends a great deal of weight as to its truthfulness.

Direct Examination of Engineer Joseph T. Carr.

Questions 19-20 and answers on page 56 of Transcript and questions 1-2, page 57 of Transcript. In answer to these questions Engineer Carr testified that he sounded the whistle for the Bagley Road crossing after he passed over

the Fry Road crossing, that it was *probably* 80 rods from the Bagley Road crossing. As the distance between the Fry Road crossing and the Bagley Road crossing was testified to by defense witnesses as between 1000 and 1200 feet the whistle post could not have been west of the Fry Road crossing. The five other defense witnesses did not hear the whistle that Engineer Carr said he blew for the first time for Bagley Road crossing after he passed the Fry Road crossing. Engineer Carr said it was probably 80 rods as 80 rods is the absolute minimum distance according to the statute *probably* is not exact enough. In order to comply with the Statute it must be exactly 80 rods. The blowing of a whistle at certain distances from a crossing and the ringing of a bell for certain distance from the crossing are absolute requirements under the Statutes of Ohio and are for the protection of the traveling public on our highways which are crossed by railroads.

Direct Examination of Ray L. Saylor.

Question 3 and answer on page 67 of the Transcript Saylor testified that it was from 8 to 10 seconds from the time he heard the whistle until he heard the crash. Using 10 seconds as the lapse of time and the speed of the train as previously testified to then the engine was 360 feet from the Bagley Road crossing when the whistle was sounded which Saylor heard and the only whistle he heard which is borne out by his answer to question 3 on page 75 of the Transcript when he says that the whistle blowing was what attracted his attention when he was reading the paragraph. He said otherwise I wouldn't have known the train was coming.

Direct Examination of John Schmidt.

Questions and answers Nos. 1-2-3-4-5-6-7 on page 81 of the Transcript Schmidt testified that he heard the train whistle and a few seconds after he heard the whistle he heard the emergency brake go on, assuming that it was five seconds after he heard the whistle before the emergency went on the whistle would have sounded when the engine was approximately 314 feet from the Bagley Road crossing which bears out the testimony of Saylor.

Direct Examination of Forrest Lees.

Questions and answers Nos. 10-11-12-13-14-15-16-17-18 on page 78 of the Transcript Lees was driving on the same road and in the same direction as Proto the driver of the car in the collision. He testified that when Proto passed him he Lees was 415 feet from the Bagley Road crossing. That when he Lees was 265 feet from the crossing he heard the whistle for the Bagley Road crossing he testified to hearing no other whistle, according to his testimony he was driving at the rate of 35 miles an hour and he estimated Proto was going 60 miles an hour when he, Proto, passed him.

According to his testimony he travelled 150 feet after Proto passed him before he heard the whistle. If Proto was travelling approximately twice as fast as Lees then Proto would have gone at least 250 feet while Lees was travelling 150 feet. That would have brought Proto to within 165 feet of the crossing when the whistle was blown. The blowing of this whistle was undoubtedly the first warning that Proto had of the approach of the train as he skidded 110 feet before coming in contact with the engine of the train. The difference between 165 feet and 110 feet would be accounted for by the reaction time.

SUMMARY OF ARGUMENT.

If a whistle was blown less than 1320 feet from a crossing it is just as much a violation of the state statute as if the whistle was not blown at all.

Ignoring all of plaintiff's evidence and knowing that defendant's evidence discloses a violation of the state statute in not blowing the whistle until 700 feet from the crossing when it should have been blown 1320 feet from the Bagley Road crossing as borne out by all of defendant's evidence then can any trial Court say that a violation of a state statute *which is negligence per se is not a proximate cause of an accident.* Is this not a question to be submitted to the jury?

In this Court's opinion affirming the trial Court nothing was mentioned regarding the evidence of the defendant's witnesses showing clear and convincing proof that the defendant was guilty of a violation of the State Statute in regard to blowing a whistle for a crossing not less than 1320 feet from the crossing.

Practically the whole opinion was taken up with the testimony of the plaintiff's witnesses. Surely the testimony of both plaintiff and defendant must be taken into consideration in ruling on this case. The fact that nothing was said in the Court's opinion about the violation of the State Statute by the defendant seems shocking.

The plaintiff was not charged with contributory negligence in the case. It is clear then if the defendant was guilty of any negligence contributing to her injuries they are liable in damages. Had the whistle been blown for this crossing according to the law of the State of Ohio it is a question for the jury as to whether this accident would have happened. No Court has the right to say it would or would not have happened. In our opinion had the whistle been blown in accordance to the law the driver of the auto-

mobile in which the plaintiff was riding would have heard the train coming at a much earlier time and have brought his car to a safe stop to protect the passengers. Certainly this is a jury question.

Had the injuries in this case been of less serious consequences it would not be so important but the plaintiff has suffered a brain injury involving dead tissues in the brain which may give rise to any number of things even insanity.

This is not stated for the purpose of drawing on the Court's sympathy but solely for the purpose of asking this Court to give serious consideration to this case.

It would seem from the Court's opinion in this case that they confused the plaintiff's testimony with that of the defense and decided that the burden was on the plaintiff to make out her case. If the testimony of the defense witnesses makes out a case for the plaintiff that burden is no longer upon her. Thus the defense witnesses did in an overwhelming manner prove that the defendant was guilty of a violation of the State Statute. This violation was clearly overlooked when the Court made its finding in this case.

Judge McAllister who wrote the opinion in both the appeal and in the petition for rehearing, states that a civil engineer testified that the distance between the Fry Rd. crossing and the Bagley Rd. crossing was about a quarter of a mile. This was a pure guess as he had not measured the distance. Earl E. Pfoh a conductor on the caboose of the train testified that the distance between the Fry Road crossing and the Bagley Road crossing was not quite 25 car lengths and stated that a car length was 40 feet to the car. This would make the distance not quite 1000 feet. This was a positive statement and no guessing.

Judge McAllister further states that one of the witnesses testified that before the train had crossed the Fry Road crossing the engineer had sounded the whistle. This is absolutely a misstatement of the facts as both Pfoh and Ferguson who were on the rear end of the caboose testified that the first whistle sounded for the Bagley Road crossing was when the caboose was over the Fry Road crossing, the length of the train was approximately 450 feet. They testified to having heard no other whistle blown except the one for the Fry Road crossing which would be at least 1320 feet from the Fry Road crossing (in other words about 2320 feet from the Bagley Road crossing). When Mr. Pfoh was asked by the defense counsel, "When your caboose was crossing the Fry Road crossing did you hear any whistles" (He answered) The whistle was blown." He was then asked "And was blown for what crossing" (he answered) For the Bagley Road."

The testimony of both Pfoh and Ferguson, employees of the defendant, showed clear and convincing evidence that the whistle was not blown for the Bagley Road crossing until the engine was within 750 feet from the Bagley Road crossing. All of this testimony was misquoted and misconstrued by the Court in rendering his opinion for the denial of the petition for rehearing.

The testimony of Mr. Saylor, Lees and Schmidt, other defense witnesses bore out the testimony of the two employees that the whistle was not blown in accordance with the state statute.

Judge McAllister says in his opinion that other testimony not quoted in the petition for a rehearing discloses that there was substantial uncontradicted evidence that the whistle was sounded in compliance with the statute. This is a gross misstatement as five of the defense witnesses testified that the whistle was not blown in accordance with

the statute as a careful examination of the evidence will disclose.

The following cases have been cited in our record throughout our case and give us the applicable Ohio law.

29 *Ohio Jurisprudence*, Secs. 72 and 73, pp. 488-491;

Hales v. Michigan Central R. Co., 200 Fed. 533;

Roth v. Pennsylvania Rd. Co., 195 Fed. 21; Court of Appeals of New York, 101 N. Y. 422;

Regert v. Payne, 274 Fed. 784;

Lake Shore and Michigan Southern R. R. Co. v. Shade, 57 O. S. 650;

Railways v. Walks, 279 Fed. 32;

The Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Kuhl, 123 O. S. 552;

Griffith v. Railroad, 44 Fed. 574, affirmed in *Railroad vs. Griffith*, 159 U. S. 603;

Garbe v. Halloran, 150 O. S. 476;

Brery, Admx., v. Pennsylvania Rd. Co., 156 O. S. 75;

Pennsylvania Rd. Co. v. Lindahl, 111 O. S. 502;

Schneider v. City of Cincinnati, 16 O. Dec. 206;

Swoboda v. Brown, 129 O. S. 522.

Respectfully submitted,

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In the Supreme Court of the United States

No. 200.

OCTOBER TERM, 1952.

EDNA CLARK,
A Minor, by Charles K. Clark, Father and
Next Friend,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
A Corporation,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

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Zivcoff, Admr. v. Pennsylvania Rd. Co. (Court of Appeals, Stark County, 1948), 86 O. App. 84; motion to certify overruled 86 Ohio App. xl (1949) 4

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In the Supreme Court of the United States

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EDNA CLARK,
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THE BALTIMORE AND OHIO RAILROAD COMPANY,
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Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The total absence of a factual statement of the case by the petitioner should provoke the interest of the Court. The following statement is made not only for the purpose of correcting this omission, but in the belief that even a brief statement will demonstrate beyond doubt that the petition here in issue is without merit.

On March 24, 1948, "a very nice day," "very bright and sunshiny" (Transcript of Record, pp. 84, 68) an automobile driven by one Olivier J. Proteau eastbound on Bagley Road in the Village of Middleburg Heights, a southwesterly suburb of the City of Cleveland, struck a southbound freight train operated by The Baltimore and Ohio Railroad Company over its single track at this point. As the photographs introduced in evidence (Defendant's Exhibits A to F, inclusive; R. 8, offered R. 87) disclose, the

intersection lies in a sparsely built-up section of the village; the only possible obstruction to view across the northwesterly quadrant is formed by the buildings of The Bagley Road Lumber Company (DX A to F, inclusive). According to plaintiff's witness, a civil engineer, DX E was taken "something less than thirty-three feet" west of the track (R. 22) and within the zone between this point and the track no effective obstruction to view could be claimed. According to the photographer himself, this photograph was taken 35 feet westerly from the rails (R. 63), and the Court will find that it discloses an absence of obstruction to an extent sufficient to permit an eastbound traveler on Bagley Road to discern the crossarm warning signs on Fry Road approximately 1,200 feet to the north, and to see well beyond (R. 21).

It was shown on the trial that Proteau had lived 1000 to 2000 feet from the crossing for a long period (R. 50, 67, 82), and having been seen on Bagley Road "innumerable times" (R. 82), the conclusion is inescapable that he knew all of the conditions at the intersection.

On the day in question Proteau picked up the petitioner, then 13 years of age, her younger sister, and a third girl of comparable age at a church about two miles west of the scene of the accident; the time was shortly before 4:00 p. m. With the radio in his vehicle playing and his three young passengers talking and laughing (R. 41), Proteau approached the grade crossing in his easterly course at a speed estimated by the engineer on defendant's train to be 60 to 70 miles per hour (R. 58) and by the plaintiff's own witness, one Donald Witting, at 60 miles per hour (R. 32).

As the defendant's train approached the highway from the north the engineer blew two series of whistle warnings (required by Ohio General Code § 8853) for

the Fry Road crossing, approximately one-quarter of a mile north according to the civil engineer whose testimony was produced by the plaintiff (R. 21). The second of these warnings was continued "until the engine struck the crossing, was on the crossing" (R. 56). The engineer further testified that after blowing his whistle warnings for the Fry Road crossing, he whistled twice for the Bagley Road crossing in the distance between the Fry Road and Bagley Road crossings, and the whistle was still blowing when the engineer, on discovering Proteau's automobile, applied his brakes in emergency (R. 58, 59). The automatic bell on the locomotive was at all times ringing, as the engineer had turned it on north of the Fry Road crossing (R. 58, 59).

These warnings were heard by the plaintiff's witness, Donald Witting, as he left a house some distance from the crossing after delivering a paper (R. 28). They were heard also by the defendant's witness, Forrest Lees (R. 78), the driver of the second of two automobiles which were slowing to permit the train to pass. While Olivier J. Proteau was required by the yellow warning stripe on the pavement which may be seen in DX A, to stay within his southerly lane of the roadway, he pulled out of his lane of traffic, passed the two intervening automobiles at a speed of at least 60 miles per hour, skidded 110 feet as he returned to his southerly lane (R. 83) in the straight lines apparent on Defendant's Exhibits B, C and D (R. 83), and smashed into collision with the right cylinder head of defendant's locomotive then fully occupying the highway. The impact was so violent as to inflict the damage to the locomotive which may be seen in DX G and to reduce his own vehicle to the wreck shown in DX H and I. Proteau himself was fatally injured and all three of his girl passengers suffered serious injuries. The train was

brought to a stop, with its third car on the highway (R. 49, 54) in a distance of 331 feet after defendant's engineer discovered the approach of Proteau's automobile (R. 59). In view of this evidence, the charge by the plaintiff of speed "both dangerous and negligent" (R. 2) was abandoned, as the District Court found (R. 90).

The Ohio Guest statute, so called, Ohio General Code § 6308-6, provides:

> **"Liability of Owners and Operators of Motor Vehicles to Guests.**—The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to * * * a guest * * * resulting from the operation thereof, unless such injuries * * * are caused by the wilful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle."

Notwithstanding this enactment, it was brought to the attention of the jury by a stipulation of counsel (R. 87-88) that The Buckeye Union Casualty Company, insurer of Olivier J. Proteau, paid the guardian of Edna Clark, in whose name the present action is brought, $1,250 for a covenant not to sue the estate of the decedent for the personal injuries sustained by the ward.

One more aspect of the case takes on a factual character by reason of recent Ohio authority. In *Zircoff, Admr. v. Pennsylvania Rd. Co.* (Court of Appeals, Stark County, 1948), 86 O. App. 84; motion to certify overruled 86 Ohio App. xl (1949), the Court held that the reaction time of a driver applying his brakes in approaching a railroad grade crossing, was a proper subject of judicial notice, and the Court fixed such reaction time at three-fourths of a second to one second. In the factual situation in the case at bar it was necessary, therefore, to add to

the 110-foot skid of Proteau's automobile, measured from marks on the pavement, the further distance of 66 to 88 feet, the distance a driver proceeding at 60 miles per hour, would travel in the interval of three-fourths of a second to one second between the time when he discovered his peril and the time when his brakes took hold following the reaction interval. Thus it can be mathematically demonstrated that the driver of the automobile in which the petitioner was riding discovered the approach of defendant's train from a point no less than 176 feet, and possibly as much as 198 feet west of the track; yet his speed was such as to result in an impact which reduced his vehicle to the wreckage shown in Defendant's Exhibits G and H.

On evidence of this import District Judge Freed directed a verdict for the defendant at the conclusion of all the testimony, explaining orally to the jury that the plaintiff's injuries "were directly and proximately caused by the sole and only negligence of the driver of the automobile, Mr. Proteau" (R. 89). For the stated purpose of bulwarking his direction to the jury, the Court proceeded also to demonstrate that none of the plaintiff's charges of negligence had been established when all of the evidence was fairly viewed. The overwhelming reliance of the Trial Court, however, was upon the issue of causation so clearly apparent in the suicidal negligence of Olivier J. Proteau, the driver of the automobile in which the petitioner was riding.

Following the overruling of defendant's motion for a new trial, premised on the usual statutory grounds that the directed verdict was contrary to law and against the manifest weight of the evidence (R. 92), an appeal was taken. The Court of Appeals (Hicks, Chief Judge; Allen and McAllister, Circuit Judges; Opinion by Judge Mc-

Allister) unanimously affirmed the Trial Court, finding that the claimed violation of Ohio General Code § 8853 had not been established, and that in any event under the authority of *Carter v. Pennsylvania Rd. Co.*, 172 F. 2d 521 (C. C. A. 6, 1949; Opinion by Judge Shackelford Miller, Jr.), the negligence of the driver of the automobile in which the petitioner was riding was the proximate cause of her injuries. A petition for rehearing, based on the ground which will have attention later in this brief, was denied.

Only the opinion of the Court of Appeals has so far been officially reported. It appears in 196 F. 2d at page 206.

COMMENT ON THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED.

From the emphasis given the portion of Rule 38(b), appearing at page 2 of the petition, it would appear that the petitioner bases her case upon a claimed abuse of judicial discretion in the courts below. In fact, the case presents only the ordinary considerations of probative value of negative testimony when met with evidence of positive character, and the application of time-worn principles in actions involving accidents at grade crossings illustrated in the federal authorities, such as *Carter v. Pennsylvania Rd. Co.*, 172 F. 2d 521 (C. C. A. 6, 1949), and in various state cases.

The recent authority of *Woodworth, Admx. v. New York Central Rd. Co., et al.*, 149 Ohio St. 543 (1948), has clear application on the correlative duties of railroads and travelers on highways at grade crossings, for the Court, speaking through Hart, *J.*, said:

> "The law recognizes the fact that ordinarily, because of unalterable circumstances, railroad companies in the operation of fast-moving trains cannot be re-

sponsible for grade-crossing collisions, and that the burden of avoiding such collisions rests, for the most part, upon the operators of vehicles using such crossings. This rule is made necessary because railroad trains are, in their operation, confined to fixed tracks, and, because of their weight and momentum, cannot be readily stopped within a short distance or space of time. *New York, Chicago & St. Louis Rd. Co. v. Kistler,* 66 Ohio St. 326, 64 N. E. 130." (pp. 549, 550.)

Apropos of the petitioner's claim that the question of causation presents an issue for jury determination to the extent that the alleged departure from this principle in the courts below furnishes the basis for intervention by this Court, a second authority in Ohio may be noted. In *Toledo & Indiana Rd. Co. v. Yhalkee* (Court of Appeals, Lucas County, 1935), 51 Ohio App. 378; motion to certify overruled, 51 Ohio App. xlvi (1935), the same claim was made in an action arising out of a grade crossing collision. Commenting upon the leading case of *Hamden Lodge v. Ohio Fuel Gas Co.,* 127 Ohio St. 469, the appeal court said (at p. 384):

"The case just cited holds, by unanimous vote of the judges of the Supreme Court, that the rule which has long been known as the 'scintilla rule' is no longer in force in Ohio. This decision results in giving the trial judge more authority than he possessed under the scintilla rule, and prevents much expense and delay in requiring the retrial of cases upon reversal where the only error found in the record was that it contained a scintilla of evidence in favor of the plaintiff.

"The Supreme Court in the case of *J. C. Penny Co. Inc. v. Robison,* 128 Ohio St. 626, 193 N. E. 401, supplementing the decision just cited, announces the following rule in the sixth proposition of the syllabus:

" '*Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with*

the rights of citizens when no question for the jury is involved, as to deny to a citizen his trial by jury when he has the right.'" (Emphasis supplied.)

In the light of the facts adduced in evidence and the application of the authorities cited, there is no question but what the lower courts properly held that the defendant was entitled to a directed verdict on the ground of the all-too-apparent negligence of Olivier J. Proteau, the driver of the automobile in which the petitioner was riding, as the proximate cause of, rather than a concurring factor in, her injuries. To have permitted a jury to pass upon the issue of proximate causation would, in the circumstances clearly apparent in the record, have been an unwarranted abdication of the Trial Court's authority, and indeed of its duty.

In view of the foregoing and in the light of Rule 38, Par. 5, it is submitted that the instant petition which "will be granted only where there are special and important reasons therefor" should not command the serious consideration of this Court. Only a denial of the petition would be consistent with sound judicial discretion in the light of the facts nowhere treated in the petition or in the brief in support thereof, and in the light of the authorities, both Federal and state, applicable thereto.

ARGUMENT.

The Petitioner's Claim on Failure to Comply With Ohio General Code § 8853 Is Without Merit.

Opposing counsel contend that the evidence discloses a violation of Ohio General Code § 8853, chargeable to the defendant as negligence *per se*. So far as apposite, the section in question provides:

> "§ 8853. *Bell and whistle on locomotive engine, when and how operated.* Every company shall attach to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engines and a steam or compressed air whistle. When an engine [is] in motion and approaching a * * * highway * * * crossing * * * the engineer * * * shall sound such whistle at a distance of at least 80 and not further than 100 rods from such crossing, and ring such bell continuously until the engine passes the crossing."

It was not contradicted in the record (R. 58, 59) that the locomotive bell, on the occasion of the accident here involved, was ringing automatically from a point north of Fry Road until the train came to a stop after its locomotive and two cars had passed over the Bagley Road pavement. On the issue of whistle warnings, the engineer testified, without contradiction (see Order of McAllister, J., denying the Petition for Rehearing (R. 125)) that the whistle had been blown twice for the Fry Road crossing, variously estimated to be 1,000 feet to a quarter of a mile north of the Bagley Road crossing, the second series of warnings continuing until the locomotive was on the Fry Road crossing itself (R. 56). The engineer further testified that as he passed over the Fry Road crossing he began two additional series of warning whistles for the Bagley Road crossing (R. 57), and these warnings were still being sounded when he lifted his hand from the whistle cord

upon discovering the approach of Proteau's automobile, and put on the emergency air brakes (R. 59).

These warnings were heard by a number of other witnesses whose estimates of the distance of the locomotive from the crossing at the time these whistles were heard varied. Suffice it to say, however, that Donald Witting, a witness for the petitioner, heard a whistle as he delivered a paper at the back door of a home some distance from the crossing before he remounted his bicycle and proceeded down the driveway of this home to a point 470 feet west of the tracks, where Proteau's automobile, going at least 60 miles per hour, flashed by him on its way to the collision which resulted in his fatal injuries. Suffice it also to remark that the warnings were sufficient to warn the drivers of the two automobiles, which Proteau passed within approximately 400 feet west of the crossing, of the approaching danger.

The attempt of petitioner's counsel to escape this evidence descends to the level of pure sophistry. The testimony of a number of witnesses, chiefly the conductor and brakeman on the train who testified that as their caboose crossed Fry Road they heard whistle warnings, is referred to, and the Court is asked to believe that this testimony related to the first or only warning heard, so as to convict the defendant of negligence *per se* in signaling within the 80-rod zone for which Ohio General Code § 8853 provides. An examination of the testimony, however, will indicate that none of the witnesses involved was speaking of the *first* warnings given but only of the *last* of the warnings prior to the collision. Thus the train conductor Pfoh testified (R. 46, 47) that in addition to the last precaution taken, whistle warnings were blown for the Fry Road crossing. The testimony of his fellow employee Virgil C. Ferguson was to the same effect (R. 53).

Much is made of the testimony of Ray L. Saylor, allegedly supporting the claim of counsel, in his statement that the time which elapsed between the moment when he heard the engine whistle and the ensuing crash was 8 to 10 seconds. In fact, however, the witness clearly stated that since he was reading a book and took the time to come to a convenient stopping place before looking for the locomotive, his conjecture as to the time involved was only an estimate. The following colloquy ensued:

> "Q. But the question is was this whistle blowing for eight or ten seconds? A. I think possibly longer than that, because, as I stated before, it attracted my attention when I still had a part of the paragraph to finish." (R. 76, 77.)

The issue of alleged late signals violating Ohio General Code § 8853 was not raised during the trial of the case nor on the motion for new trial. Alluded to in short compass in the briefs in the Court of Appeals, the matter was not argued to that court by counsel for the petitioner until the appellant's presentation in rebuttal, when no effective reply could be made. The claim was met head-on by Judge McAllister in his order on the petition for rehearing, wherein the Court, after considering the disputed testimony with reference to the last of the whistle warnings which were sounded, stated succinctly (R. 126):

> "* * * The testimony, however, is not to the effect that the whistle was not blown at least eighty and not further than one hundred rods from the Bagley crossing.
>
> "* * * there was substantial uncontradicted evidence that the whistle was sounded in compliance with the statute."

Thus *it is simply not true* that the *only* whistle and bell warnings given by the respondent were given within the

80-rod zone north of the Bagley Road crossing; if there were truth and merit in this claim it is reasonable to assume that it would have been timely developed and brought before the District Court and the Court of Appeals.

But there is a fatal lack of consistency which in itself brands petitioner's claim of late signals as being without merit. If, contrary to the clear showing in the record, it were admitted that the *only* warnings by whistle or bell were given in accordance with the statutory dictates not less than 80 nor more than 100 rods north of the Bagley Road intersection, the automobile driven by Olivier J. Proteau, at a speed at least twice that of the train, according to the witnesses, would have been not less than 160 rods, or 2,640 feet, west of the track when the last whistle blast ceased. When the Record discloses that the radio in the automobile was playing and that the petitioner and her two girl companions were talking and laughing (R. 51), it would be a perilous assumption, at best wholly conjectural, that the driver, Proteau, would have derived any effective warning.

Opposing counsel are in the untenable position of urging that the *last* of the whistle warnings was prolonged to such a point that although they were borne in on the consciousness of all the other witnesses, including the witnesses, Witting, Saylor and Lees, they were not effective to spare Proteau his death crash. The last whistle blast of many was not effective to warn Olivier J. Proteau only because of his negligence in approaching the tracks, with the location of which he was wholly familiar, at such a rate of speed that he could not bring his vehicle to a stop. His conduct must be appraised in the light of the physical facts, demonstrating beyond contradiction that he knew of the approaching train when he was not less than 176 feet from the point of impact.

In this connection it is interesting to note in the record that plaintiff's counsel, in the cross-examination of the witness Saylor (R. 76), attempted to show from a statement which was exhibited to him, that "the whistle was a rather long blast. The whistle *stopped*, and a matter of seconds *later* I heard a crash out front". Obviously counsel in this line of examination was attempting to show that a whistle signal was given *too long* before the crash, whereas petitioner now seeks to show that the warnings came *too shortly* before the accident to be effective. Such a shift of claims cannot inspire confidence in the present argument, and it is indeed without substance either to convict the lower courts of departure "from the accepted and usual course of judicial proceedings," or to shock this Court into intervention in the exercise of sound judicial discretion.

The Negligence of the Driver of the Automobile in Which Plaintiff Was Riding Was the Proximate Cause of Her Injuries, as a Matter of Law.

The second ground upon which the petition is based is that the issue of causation was one for the jury. It is claimed that in disregard of this principle the Trial Court directed a verdict for the plaintiff and the Court of Appeals affirmed it.

Sufficient has already been said to illustrate that in the factual situation presented by the evidence, the courts below properly exercised their judicial functions in granting a direction, and conversely that they would have abused their discretion had they acted otherwise to make a jury question where none existed.

That the lower courts had proper authority for their position is demonstrated beyond doubt by two recent authorities in the Court of Appeals of the Sixth Circuit. In *Price v. New York Central System,* 91 F. Supp. 898 (1950),

Judge Shackelford Miller, Jr., sitting in the District Court as a trial judge, took the occasion to review the Ohio authorities which enunciate the duty of a traveler on the highway approaching a railroad grade crossing to look and listen for an approaching train as he nears the track on which it might be proceeding, at a time, from a place, and in such a manner as will make his looking and listening effective for the avoidance of danger and serious injury. All of the authorities there reviewed support the lower courts in their determination that the negligence of a driver of an automobile may be found the proximate cause of injuries to his passengers as a matter of law, absolving the railroad which is charged with negligence in the usual particulars relating to warnings by bell and whistle, failure to provide watchmen or other extra-statutory precautions, and the like.

But the authority of clearest application is found in the case of *Carter v. Pennsylvania Rd. Co.*, 172 F. 2d 521 (1949). The Trial Court directed a verdict for the defendant in an action to recover for the death of a passenger in an automobile struck at a grade crossing at which the defendant had placed cars at such distance from the pavement that a clear view in the direction from which the train approached could not be attained at a greater distance than 26½ feet from the track. Speaking for the Court of Appeals in affirming the Trial Court, Judge Miller said (at page 523):

> "* * * The driver made the crossing every day, was very familiar with it, and necessarily must have observed the three coal cars which the appellee had placed on the spur track two days before the accident. They formed no obstruction to a clear view of the main track at a distance of 26½ feet from it, in which space it was the duty of the driver to look and listen for any on-coming train before crossing. De-

troit, T. & I. R. Co. v. Rohrs, 114 Ohio St. 493, 503, 151 N. E. 714. The uncontradicted evidence is that the driver attempted to make the crossing without stopping, clearly showing it to be his negligence which caused the accident. * * *

"This ruling is not an extension of our ruling in Detroit, T. & I. R. Co. v. Yeley, 6 Cir., 165 F. 2d 375, so as to result in imputing negligence of the driver of a car to a passenger therein, as contended by appellant. In the Yeley case the principal issue was the question of contributory negligence. In this case the question of contributory negligence is not involved, the District Judge correctly ruling that the negligence of the driver was not to be imputed to the passenger. *But if the accident was caused solely by the negligence of the driver, and not by any negligence on the part of the railroad company, the basis for any liability is lacking, without reaching any issue of contributory negligence.*" (Emphasis supplied.)

Without multiplying authority, it may be said that recent decisions of several Ohio courts fully support the rulings in the case at bar. The following are illustrative:

Continental Baking Co. v. Pennsylvania Rd. Co. (Court of Appeals, Lucas County, 1950), 87 Ohio App. 505; motion to certify overruled 87 Ohio App. xxxix (1950);

Croke v. Chesapeake & Ohio Ry. Co. (Court of Appeals, Lucas County, 1949), 86 Ohio App. 483; motion to certify overruled 86 Ohio App. xxxix (1950);

Toledo & Indiana Rd. Co. v. Yhalkee (Court of Appeals, Lucas County, 1935), 51 Ohio App. 378; motion to certify overruled, 51 Ohio App. xlvi (1935);

Lacey v. New York Central Rd. Co., 54 Ohio Abs. 417 (1948).

Upon this issue of proximate cause it must be said that when all precautions taken in conformity with law (i.e., the crossarm warning signs erected by the respondent at its track, the highway warning signs both at the margin of the highway and on the pavement itself, and the whistle and bell warnings which cannot be denied if the Record is fairly read) were effective to warn every other person in the vicinity, including two persons whose automobiles were passed by the decedent Proteau just before the collision of his automobile with defendant's locomotive then fully occupying the roadway, and when it appears from undeniable physical evidence that without regard to those warnings the driver Proteau knew of the train's approach when he was not less than 176 feet from the track on which it was traveling, it would have been a breach of duty on the part of the lower courts to permit a jury to speculate on whether the claimed omission of whistle and bell warnings—whether too early or too late before the crash—might have figured causally in the petitioner's injury. This is particularly true when in fact seasonable warnings of this character were overwhelmingly apparent in the testimony, as both the District Court and the Court of Appeals specifically and properly found.

CONCLUSION.

The petition for writ of certiorari characterizes as "shocking" the lower courts' action on the respondent's alleged violation of Ohio General Code § 8853, in giving warning signals supposedly too late, and counsel for petitioner would have this Court believe that the handling of the case below on the issue of causation, as a matter of law, was equally without warrant or precedent. In fact both the District Court and the Court of Appeals refused to be swayed by claims so belatedly made (in the case of

the alleged statutory violation in giving signals too late) and so transparent when asserted, in the light of the record. The testimony challenges every assertion now made on behalf of the petitioner to the extent that if the petition involves special and important reasons they are only reasons for denying the relief presently sought.

Respectfully submitted,

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